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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN,
R. E. MacDONALD, ET AL.,
Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

M. WALTON HENDRY,
BERNARD J. GALLAGHER,
J. ROY THOMPSON, JR.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN, R. E. MacDONALD, O. E. SCHAEFFER, R. J. MOORE, HARRY F. WEINBERGER, AND GEORGE E. GILMORE, CO-PARTNERS, DBA TARLTON-MacDONALD COMPANY,

Petitioners and Plaintiffs Below,

vs.

THE UNITED STATES,

Respondent and Defendant Below

THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice and Associate Justices of the United States:

Appellants respectfully petition that a writ of certiorari issue to review the judgment of the Court of Claims of the United States, entered in the above cause on May 2, 1949, and order entered October 3, 1949, overruling petitioners' motion for a new trial.

Statement of the Matter Involved

On May 19, 1942, petitioners entered into a contract with respondent for the construction of a Modification Center, a large building for the housing of airplanes being equipped for combat service (Rec. 7, 25, 26). The bid was conditioned upon agreement of respondent to "furnish all priority that will be required to enable us to obtain without delay all materials and equipment."

The lumber required was of lengths and sizes unusual and, therefore, was extremely difficult to obtain during the war period, and the work was being seriously delayed. In order to avoid this delay, the respondent's Contracting Officer, under the authority conferred upon him by Article 3 of the Contract (Rec. 8), ordered and instructed petitioners to procure the lumber at once from whatever sources it could be secured, at whatever price they could purchase the same, even though such action resulted in duplicate orders; and further instructed petitioners not to cancel orders that petitioners had placed through respondent's Central Procurement Agency, but directed petitioners, also, to accept such lumber as might be shipped to it through this agency, from time to time. The Contracting Officer promised in writing that, if more lumber was secured from the above sources than was necessary to complete petitioners' contract, respondent would accept it for use on other projects and pay the cost of such lumber and would, also, pay petitioners whatever excess costs were incurred in purchasing the lumber for use on petitioners' contract, above what it would have cost petitioners through the respondent's Central Procurement Agency (Rec. 26-30, both inclusive, 37).

Upon completion and acceptance of the contract work, there developed a disagreement between the Contracting Officer and petitioners as to the correct amount of the set-

tlement growing out of the purchase of the lumber, as ordered by respondent's Contracting Officer. Petitioners claimed $25,000.00 for the excess cost of lumber, including other items; whereas, the Contracting Officer's figure was approximately $15,000.00. Petitioners and the Contracting Officer thereupon reached a compromise whereby it was agreed there was due petitioners the total sum of $17,363.27 (Rec. 29-31). Pursuant thereto, Change Order 33 was drawn up by the Contracting Officer and executed by him and petitioners.

Thereafter, respondent's Division Engineer, without any authority whatever, set aside the compromise agreement, Change Order 33, over petitioners' protest, and allowed petitioners only $9,751.45, leaving a balance due, in accordance with the terms of the compromise agreement, Change Order 33, of the sum of $7,611.82 (Rec. 30-32; Court's Find. 19 to 23, both inclusive).

Under the terms of the Contract, the Contracting Officer had sole authority to bind the respondent as the power of Superior Officers to disapprove his action was eliminated from the Contract before signing (Rec. 26, Find. 7).

The Court of Claims held that the agreement on the part of the respondent's Contracting Officer, to pay petitioners the excess cost of the lumber purchased for use on their contract, over what it would have cost petitioners in obtaining this lumber through the Central Procurement Agency was without consideration and invalid; and, further, because this item was included in the compromise agreement, the Court of Claims disregarded and held for naught the compromise agreement, Change Order 33 (Rec. 38).

Jurisdiction

The judgment of the Court of Claims of the United States, to be reviewed, was entered on the 2d day of May, 1949, and

appellants' motion for new trial was overruled on October 3, 1949.

The jurisdiction of this Court is invoked under Section 288, Title 28, U. S. Code, Annotated.

Statutory Provisions Involved

The statutory provision involved is Section 201 of the First War Powers Act of 1941. 55 Stat. 838, 834 and Executive Order 9001 issued thereunder.[1]

---

[1] *Section* 201.—The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided,* That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further,* That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

Executvie Order 9001, December 27, 1941. The War Department, the Navy Department and the U. S. Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance progress and other payments under such contracts, of any percentage of the contract price and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including liquidated damages or liability under surety or other bonds, wherever, in the judgment of the War Department, the Navy Department or the United States Maritime Commission, respectively, the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be *with or without consideration* and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of, *or the form of,* the contract amended or modified, or of the amending or modifying contract and, *irrespective of rights* which may have accrued under the contract and the amendments or modifications thereof (italics ours).

Questions Presented

The questions of wide and general importance which will be presented, if this petition be granted, are these:

1. Is a common-law consideration a prerequisite to support a modification of a pending Government contract during the late war, entered into during the war to facilitate the prosecution of the war, in the form of a change order duly executed by competent parties in view of Sec. 201 of the First War Powers Act of 1941 (55 Stat. 838) and Executive Order 9001 issued thereunder?

2. Can the Government escape liability on the ground of lack of consideration for a written promise by its duly authorized Contracting Officer having sole authority under the contract to make changes thereunder, to pay petitioners the excess cost incurred solely by reason of compliance with that Officer's lawful order to purchase double the quantity of lumber required for the contract *at once,* regardless of price, wherever obtainable and (in some cases) especially fabricated, whereby the Government obtained earlier completion of an urgent war contract and also a surplus of lumber for its own use on other projects during the war period when lumber was scarce and difficult to procure?

3. Can a governmental superior officer, merely because he is a superior officer, lawfully direct a contracting officer who under the contract has sole and full authority to and does enter into a binding contract, to vacate and hold for naught such a contract?

4. Can the Govenrment escape liability under a compromise agreement in the form of a change order issued by its duly authorized Contracting Officer who had sole authority to make changes under the contract, which change order was duly signed by both the Contracting Officer and petitioners?

Reasons Relied upon for the Allowance of the Writ

1. This case involves the interpretation and application of Sec. 201 of the First War Powers Act of 1941 and Executive Order 9001 issued thereunder.

2. The decision of the Court of Claims in the instant case is in conflict with all prior decisions interpreting this Act and Executive Order 9001 issued thereunder and the decisions on the point at issue.

3. The Court of Claims has erred in the application of fundamental rules of law governing Government Contracts, viz.: (a) Erroneous conceptions of what constitutes at common law consideration for the modification of a Government Contract; (b) The erroneous conception that a compromise agreement in the form of a change order or modification of a contract duly executed by the proper parties is invalid because the compromise agreement contained an item which, in the opinion of the Court, was an invalid claim. The opinion of the Court of Claims in the instant case is in conflict in this respect with the decision of this Court in the case of *Hennessy* v. *Bacon*, 137 U. S. 78, 85; 34 L. ed. 605, and also with the decisions of the Court of Appeals, Eighth Circuit, in the case of *Daly* v. *Busk Tunnel Ry. Co.*, 129 F. 513, 521.

4. The Court of Claims erred in holding that a superior officer had the power or authority to set aside and hold for naught a binding compromise agreement in the form of a change order duly executed by petitioners and the Contracting Officer who had sole authority under the contract to issue and execute such a change order.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the Seal of this Court, directed to the Court of Claims of the United States, in the case entitled

William MacDonald, James J. Coleman, R. E. MacDonald, O. E. Schaeffer, R. J. Moore, Harry F. Weinberger and George E. Gilmore, Co-Partners, dba Tarlton-MacDonald Company *vs.* The United States, No. 46505, to the end that this cause may be reviewed and determined by this Court; that the judgment and order of said Court of Claims be reversed by this Honorable Court.

Respectfully submitted,

M. Walton Hendry,
Bernard J. Gallagher,
J. Roy Thompson, Jr.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 514

WILLIAM MacDONALD, JAMES J. COLEMAN, R. E. MacDONALD, O. E. SCHAEFFER, R. J. MOORE, HARRY F. WEINBERGER, AND GEORGE E. GILMORE CO-PARTNERS, DBA TARLTON-MacDONALD COMPANY, *Petitioners,*

vs.

THE UNITED STATES,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Preliminary Statement

The opinion below, the statement of the matter involved, jurisdiction and statutory provisions involved and the questions presented, appear in the petition for a writ of certiorari herein and, in the interest of brevity, are incorporated here by reference.

II. Summary of Argument

Point 1. The holding of the Court of Claims that petitioners are not entitled to recover the excess costs for lumber purchased on the ground that there was no consideration for the promise of respondent's Contracting

Officer to pay petitioners for the increased costs in purchasing the lumber in question for petitioners' use under their pending contract, and, also, for respondent's use on other projects is immaterial to the issues in this case and an improper basis for the dismissal of petitioners' petition, for the reason that the order of respondent's Contracting Officer, to purchase this lumber, was an order coming within the purview of the First War Powers Act of 1941, Section 201 and Executive Order 9001, issued thereunder, which required no consideration for such an order changing and modifying the pending contract.

If the orders of the Contracting Officer to purchase this lumber at once did constitute an order coming within the purview of the First War Powers Act of 1941, Section 201, Executive Order 9001, issued thereunder, then no consideration whatsoever was necessary to validate the orders of the Contracting Officer, including the Compromise Agreement, Change Order 33; and the Court was, therefore, in error in setting aside the Compromise Agreement, Change Order 33 (Rec. 31, 32, Find. 20-22, both inclusive, 38), on the ground of lack of consideration. We submit that the orders of the Contracting Officer came within the purview of the First War Powers Act of 1941, Section 201, Executive Order 9001 issued thereunder.

In the case of *Dorsey* v. *Oregon Motor Stages,* 194 P. (2d) 966, the Supreme Court of the State of Oregon carefully analyzed Section 201 of the First War Powers Act of 1941 and Executive Order 9001, issued thereunder, with respect to the question at issue herein; and what constitutes an order under that Act and Executive Order 9001. In this case, the Court held (p. 976) that the purpose of Section 201 of the First War Powers Act and Executive Order 9001 was to enable those who were subordinate to the President, to contract freely for all supplies and services needed to facilitate the prosecution of the

war; and, in support of its opinion, referred with approval to the case of *Roxford Knitting Company* v. *Moore and Tierney, Inc.*, 265 F. 177, 11 A. L. R. 1415, cert. den. 253 U. S. 498, 64 L. ed. 1032, stating that that case had many points in common with the essential points in consideration. In this latter case, in construing the National Defense Act of June 3, 1916, 50 U. S. C. A., paragraph 80, the Court of Appeals, Second Circuit, held that the essential order need not be in any particular form nor be given by the President, himself, but could be given by his subordinates; and that, if the conditions justified the order, due to war conditions, this was sufficient.

In its opinion in the *Dorsey* v. *Oregon Motor Stages* case, *supra*, the Supreme Court of Oregon pointed out that the First War Powers Act of 1941, Section 201 and Executive Order 9001, issued thereunder, was analogous in the following essential points, to the National Defense Act as construed by the Second Court of Appeals in the *Roxford Knitting Company* case, *supra:* the essential order need not be given in any particular form; the order may be given by a subordinate; it is not necessary to constitute such an order to make a finding that the order was given to facilitate the prosecution of the war; but that, if the conditions and circumstances existed which justified such an order, that was sufficient. In the instant case, there is no question but that the Contracting Officer was a proper officer to give the order and that the conditions existed, such as would justify such an order. The Court of Claims in the instant case held that this was a war contract, that "it was a rush job." The Modification Center was being built to house combat airplanes, which were urgently needed for the war (Court's Find. 9, Rec. 26). The Court has further found (Court's Find. 2 to 5, Rec. 25, 26) that petitioners were requested to submit a bid within two days for this project, and the transaction was closed by

telegram, showing the necessity for speed, and that speed was paramount.

The Court of Claims held that from Article 3 of the formal Contract there was deleted, prior to the execution, the following provision, to wit:

> "No change involving an estimated increase or decrease of more than $500.00 shall be ordered unless approved in writing by the Head of Department or his duly authorized representative" (Court's Find. 7, Rec. 26).

It will be noted that under Article 3 of the Contract, the Contracting Officer is given authority to make changes in the Contract. Since, therefore, in the instant case, the provision in the Contract which required the approval of the Head of the Department or his authorized representative, of changes made by the Contracting Officer, involving an estimated increase or decrease of more than $500.00 was specifically deleted from the Contract prior to the execution thereof, it is plain that, under the terms of the Contract, the Contracting Officer was vested with sole power and authority to make changes in the Contract in writing, in any amount and, therefore, he alone had the power, under the Contract, to make the change in the Contract, which he did in giving orders to the petitioners for the purchase of the lumber in question.

We respectfully submit, therefore, that petitioners' case comes clearly within the *Dorsey* v. *Oregon Motor Stages* and *Roxford Knitting Company* cases, *supra*. (1) It has been shown that the Contracting Officer had sole authority, as a subordinate of the President, to make a change under the contract and give the order which he gave to petitioners in this case, to purchase its lumber; (2) It has been shown that the emergency existed and that the orders of the Contracting Officer could not have been given for any

other purpose than to facilitate the prosecution of the war; (3) The orders of the Contracting Officer were in no uncertain terms; and, by these orders, petitioners were clearly led to believe that they had no alternative but to comply with these orders. The Court of Claims has quoted in its findings the numerous letters which respondent's Contracting Officer wrote petitioners, in which in numerous instances he stated:

> "These *orders* and authorizations are given you" * * * "inasmuch as the Government is *ordering you* to purchase this lumber" * * * "Thus you will not be hurt financially by these *orders making you purchase at once.*" (Italics ours.)

There is, therefore, no mistaking of the fact that plaintiffs were ordered in no uncertain terms to comply with these orders.

For the reasons stated, and under the authority of the cases cited, we respectfully submit, therefore, that the orders of the Contracting Officer in the instant case, making petitioners buy this lumber at once, wherever they could get it, regardless of price, for use on this urgent, pending war contract, during the war period, and also for the use of respondent on other projects with which petitioners have no connection, and directing them where and at what prices to purchase, was plainly an order within the purview of Section 201 of the First War Powers Act and Executive Order 9001; and that the Court of Claims was, therefore, in error in holding that the petitioners were not entitled to recover the excess costs incurred in purchasing the lumber in question on the ground that there was no consideration for the promise of the Contracting Officer, to pay for such excess costs.

Point 2—The Court of Claims erred in holding that there was no consideration for the promise of the Contracting

Officer, to pay for the excess cost of lumber purchased by petitioners, pursuant to the orders of the Contracting Officers.

In its opinion the Court of Claims held that:

> "* * * plaintiff had done nothing more than it was required to do under the contract." (Rec. 38)

This excerpt from the Court's opinion refers to the lumber which petitioners bought for use in their own contract, upon the promise of the Contracting Officer that he would pay petitioners for the excess costs of procuring the same.

We fully agree with the Court's conclusion that:

> "Plaintiff's contract was for a lump sum and it was required to do whatever might be necessary in order to perform it." (Rec. 38)

But we do not agree that, in carrying out the orders of the Contracting Officer to purchase this lumber, plaintiff did "nothing more than it was required to do under the contract." In Court's Finding 15 (Rec. 28, 29), it is noted that the second paragraph of the letter from the Contracting Officer, referred to, reads as follows:

> "These are your instructions and your authorization to purchase these timbers *at once* from the *Union Pacific Railway Company for your job.*" (Italics ours)

In Court's finding 17, Record 29, 30, the Court quotes from a letter of the Contracting Officer, in which that officer stated:

> "Inasmuch as the central procurement orders have not arrived, and inasmuch as it is absolutely imperative that *we purchase* lumber elsewhere outside of the central procurement *at once* in order to keep your job going, these *orders* and authorization are given you * * * Inasmuch as the government is *ordering you* to purchase this lumber out (in some cases even having

> the heavier timbers fabricated); necessitating the payment of higher prices for lumber • • • Thus you will not be hurt financially by these *orders, making you purchase at once* wherever you can get these items." (Italics ours)

It will be noted that we have emphasized with italics the fact that the Contracting Officer not only authorized, but *ordered,* petitioners to purchase this lumber "*at once.*" We submit that there was no contract obligation on the part of the petitioners to purchase any of this lumber "*at once*" and pay whatever price it was necessary to pay to get it "*at once.*" We agree with the Court's statement in its opinion (Rec. 38), that:

> "Plaintiff was required to secure the lumber from whatever source it could obtain it and to pay therefor whatever price it had to pay";

but we submit that petitioners were not required to do this "*at once*" or *wherever or whenever* ordered by the Contracting Officer to do it. Petitioners had the undoubted right, under its contract, even at the risk of delay or of paying liquidated damages, to take whatever time they considered necessary in purchasing this lumber in order to save cost on the same.

Furthermore, petitioners were not required, under their contract, to purchase lumber from whatever firm defendant's Contracting Officer selected or from whom the Contracting Officer directed him to purchase the same; nor were petitioners, under their contract, required to get the approval of any purchases they made from the Contracting Officer before the purchase was consummated, yet, in Court's Findings 13 and 18, Record 27, 30, both inclusive, it is clear that it was necessary for petitioners to obtain the approval of the Contracting Officer, not only of *the prices*

paid for the lumber but *the sources* from which it was obtained.

In the excerpt from the Contracting Officer's letter, quoted in Court's Finding 17, Record 29, 30, it will be further noted that defendant ordered petitioners not only to make purchases at certain prices but, also,

> "in some cases even having the heavier timbers fabricated."

There is not one word in petitioners' contract, which required petitioners to purchase lumber at certain prices or have the heavier timbers fabricated if petitioners had difficulty in obtaining the timbers in question. True, petitioners were required to get the material called for in the contract; and, if it became impossible to get it unless it was fabricated, to have it fabricated, but there is nothing whatever in the Record to show that it was impossible for petitioners to obtain the heavier timbers except by having them fabricated. Petitioners had the unquestioned right under their contract to take whatever time petitioners deemed necessary to buy the heavier timbers, in order to avoid the expense of having them fabricated.

The Court of Claims further found:

> "The contracting officer thereupon instructed plaintiff, without cancelling its previous orders through Central Procurement Agency, to procure lumber from other sources wherever possible, even though such action resulted in duplicate orders." (Rec. 27)

Was there anything in petitioners' Contract, which required them to order double the quantities of lumber that they needed on the project? Clearly there was no such provision in the Contract; and, clearly, the giving of duplicate orders was, therefore, more than petitioners were required to do under the terms of the contract. We submit, there-

fore, that the Court of Claims is in error in holding (Rec. 38) that:

> "* * * plaintiff had done nothing more than it was required to do under the contract."

Williston on Contracts, Revised Edition, Volume 1, paragraph 102, states:

> "The requirement ordinarily stated for the sufficiency of consideration to support a promise is in substance a *detriment* incurred by the promisee or a benefit received by the promissor at the request of the promissor * * * that a *detriment* suffered by the promisee at the promissor's request, and as the price for the promise, is sufficient *though the promissor is* not *benefitted,* is well settled." (Italics ours)

In paragraph 102 A, same edition, the same author states:

> "It would be a detriment to the promisee in a legal sense if he at the request of the promissor, and upon the strength of that promise, had performed any act which occasioned him the *slightest trouble or inconvenience* and which he was not obliged to perform * * * It means giving up something which immediately prior thereto the promisee was privileged to keep or doing or refraining from something *which he was privileged not to do* or refrain from doing. And the benefit correspondingly must mean the receiving as the exchange for his promise of some performance or forbearance which the promissor was not previously entitled to receive; *that the promissor desired it for his own advantage* and had no previous right to it is enough to show that it was beneficial." (Italics ours)

In paragraph 131 B, same edition, the same author further states:

> "On any theory of consideration it is to be noticed that if the act, the performance of which or the promise of which, is a consideration for the new agreement, dif-

> fers in any respect from the act which the double contractor was under a previous obligation to perform, his second agreement is binding for the difference *however trivial* is enough to make a new performance *detrimental* or the new promise a promise of *something detrimental.*" (Italics ours)

Again, Professor Williston, in his work on Contracts, Volume 3, Edition 1936, paragraph 680, says:

> "If in any case the substituted performance given or agreed to be given is different from that originally contracted for, and is not merely less, the later agreement is supported by sufficient consideration and is unquestionably binding."

The Circuit Court of Appeals of the Tenth Circuit in the case of *Petroleum Refractionating Corporation* v. *Kendrick Oil Co.*, 65 Fed. (2d) 997, we submit, correctly stated the law on the point at issue, stating:

> "A benefit to the promisor or a detriment to the promisee is a sufficient consideration for a contract.
>
> "The detriment need not be real; it need not involve actual loss to the promisee. The word, as used in the definition, means legal detriment as distinguished from detriment in fact. It is the giving up by the promisee of a legal right; the refraining from doing what he has the legal right to do, or the doing of what he has the legal right not to do.
>
> "And where there is a detriment to the promisee, there need be no benefit to the promisor."

Included in the authorities cited in the last-mentioned case are decisions of this Court.

The findings of the Court of Claims (Rec. 27-30) where the letters of the Contracting Officer, which contain the orders given by the Contracting Officer, are quoted, show that in compliance with these orders of the Contracting

Officer petitioners were required to perform the following acts which they were not obligated to perform under the original contract (Find. 13 to 18, both inclusive; Rec. 27-30, both inclusive).

1. To procure the lumber in question *at once, regardless of price;*

2. To make purchases upon *the approval* of the Contracting Officer;

3. To make purchases from such sources and at the prices *as directed* and approved by the Contracting officer;

4. To have the heavier timbers *fabricated;*

5. To order double the quantity required for petitioners' own use;

6. To order lumber for respondent's exclusive use on other projects.

Under the law and authorities cited, these requirements and acts on the part of petitioners were a detriment to petitioners, being requirements and acts which petitioners were not required to perform under the original contract, any one of which was a valid consideration for the promise and agreement of respondent's Contracting Officer, even if respondent received no benefit therefrom.

It will be noted that Williston on Contracts, in the excerpts hereinbefore quoted, states that the slightest trouble or inconvenience not theretofore obligatory upon the promisee, is sufficient consideration. This same rule of law was also long since announced by the Supreme Court in the early cases of *Austyn* v. *McLure,* 4 U. S. 227; *Lawrence* v. *McCalmont,* 43 U. S. 426. Clearly, what the plaintiffs were required to do upon the orders of the Contracting Officer was far more than a slight trouble or inconvenience, in the instant case. They involved expense of traveling and of

obtaining lumber *at once*, regardless of price; of ordering double the quantity required by the contract; of handling and taking care of all of this lumber—a large part of which was of no use to plaintiffs in their contract; and, then, of the risk of eventually running into a lawsuit (which has been done in the instant case), in order to get paid.

We wish to invite attention further to the fact that, in order to constitute legal consideration, it is not necessary that the promisor actually benefit. It is enough if there is any detriment suffered by the promisee, under the rule of law as announced in the cases cited, *supra*. So that even if the respondent obtained no benefit by the compliance with the Contracting Officer's orders, pursuant to the promise of the Contracting Officer, still any detriment or the slightest inconvenience to the promisee was ample consideration for the agreement of the Contracting Officer.

Respondent Received Valuable Benefits from the Compliance by Petitioners With the Orders of Respondent's Contracting Officer.

It is only necessary to look at the finding of the Court of Claims (Find. 27, Rec. 33) to conclude that the Court of Claims itself found it to be a fact that respondent received valuable benefits by compliance of petitioners with the orders of respondent's Contracting Officer. In this finding, the Court of Claims found (1) "• • • defendant secured more rapid progress on the project than would have been obtained • • •"; (2) "By such means the defendant also secured a backlog of lumber for other projects at a time when lumber was scarce and difficult to procure."

Williston states, paragraph 102 A, hereinbefore quoted, that any benefit means:

> "the receiving as exchange for his promise of some performance or forbearance which the promisor was not previously entitled to receive."

Clearly, the six forbearances and performances hereinbefore listed in detail constituted abundance of forbearance or detriment to which the Contracting Officer was not entitled under the original contract; and the securing of more rapid progress and of getting a backlog of lumber for other projects at a time when lumber was scarce and difficult to procure was not only a slight benefit but a great benefit, since this was a war contract and this Modification Center was being built to house combat airplanes, and utmost speed was essential to facilitate the war effort (Rec. 25-27, Find. 2-12, both inclusive).

In the case of *Bliss Company* v. *United States*, 70 C. Cls., 176, a somewhat similar situation arose. In that case, after the formal contract had been entered into, the Navy Department adopted a policy for increased wages and directed the contractor to put these wages into effect and, thereafter, press its claim for increased cost of performance. The point of lack of consideration of authority was raised when the case was first tried before the Court of Claims, and that Court sustained the Government's contentions (61 C. Cls. 777); but the Supreme Court thereafter reversed that Court (275 U. S. 509, 510) and held that the supplemental contracts were based upon an adequate consideration. The Court of Claims, in further discussing this matter (70 C. Cls. 200), pointed out that the Government's necessity, due to the war, gave rise to the action. Just so, in the instant case, the Government's necessities, due to the war, gave rise to the orders of the contracting officer.

The Court of Claims Is in Error in Approving the Unauthorized and Illegal Action of the Division Engineer in Setting Aside Change Order 33.

The Court of Claims held (Find. 7, Rec. 26) that from Article 3 of the Contract there was deleted before signing the usual provision of the standard Government Contract

which required changes in the contract, involving more or less than $500.00, to be approved by higher authority. This was undoubtedly done by respondent in the instant case to avoid delay because this was an urgent war contract. By deleting this provision from this Contract, respondent gave to the Contracting Officer exclusive authority under Article 3 to make changes and to reach agreement with petitioners as to such changes. Therefore, when Change Order 33, the Compromise Agreement, was drawn and signed by both parties as heretofore and hereafter shown, it became a binding contract supplemental to the original contract which no superior officer to the Contracting Officer, or any other officer for respondent, had the power to set aside.

Murray et al v. *U. S.*, 67 C. Cls. 633;
Electric Boat Co. v. *U. S.*, 66 C. Cls. 333, 370, 375;
The Arundel Corporation v. *The United States*, 96 C. Cls. 77, 114;
Standard Dredging Co. v. *U. S.*, 71 C. Cls. 218;
Phoenix Bridge Co. v. *U. S.*, 85 C. Cls. 603, 629;
United Cartridge Co. v. *U. S.*, 62 C. Cls. 214, 264.

The Court of Claims Is in Error in Setting Aside Change Order 33 Since This Change Order Was a Duly Executed Compromise Agreement.

It is petitioners' contention that, even if the Court is correct in holding that the item of excess costs of lumber of $8,303.71, which was included in the compromise agreement, Change Order 33 (Rec. 31, Court's Find. 20), bought under the Contracting Officer's orders, with promise to pay for same, was without consideration and therefore invalid, that the inclusion of this item in the compromise agreement was not a proper ground for setting aside the compromise agreement.

It has long been settled that the compromise of a doubtful claim or of a disputed or unliquidated claim is founded on a sufficient consideration. *Bank of Georgetown* v. *Geary*, 30 U. S. 99, 8 Law ed. 60, and where a claim is unliquidated or honestly in dispute, the compromise is a good consideration for any concession made. *Ansberry* v. *Harrah*, 80 Fed (2d) 381, 65 App. D. C. 80. There is no question that the claim of petitioners, that came up for final settlement and resulted in the compromise, was an unliquidated claim; that the amount of this claim was honestly in dispute between the parties; and that in the compromise petitioners accepted less than they were claiming (Rec. 30, 31, Cts. Find. 19, 20).

It is, also, well settled that the law favors a compromise of doubtful claims and the avoidance of litigation; and even though it eventually appears that if the demand had been litigated, no recovery could have been had, still the compromise of such a claim is supported by a valid consideration. *Daly* v. *Busk Tunnel Ry. Co.*, 129 Fed. 513, 521. In the case of *Trumbull Steel Company* v. *The United States*, 76 C. Cls. 391, 1 Fed. Supp. 762, the Court of Claims held that the settlement or compromise of a tax liability after the period of limitation on the Government's claim for unpaid tax had expired was valid, notwithstanding the fact that at the time of settlement the taxpayer's right to recover back sums paid was doubtful and neither party believed collection of the tax was barred. Here is a case where the situation is in reverse to the instant case; viz., a compromise is upheld by which the Government is allowed to retain taxpayers' money although the Government's right to do so is barred by the statute of limitations. In other words, in this case the Government had no legal right whatsoever to the moneys received, except by the compromise. In this case, the Court of Claims quoted

with approval from 12 C. J., p. 239, paragraph 18, as follows:

> "'It is clear, however, that the claim need not be valid in the sense that claimant be able to recover on it, and it is not material that the other party may have a good defense; or that a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed; or that one of the parties may afterward find out that he might have obtained a judgment more favorable to him by trying out the claim on its merits.' Further, in section 19, p. 331, it is said: According to the great weight of authority, it is sufficient to support a compromise that there be an actual controversy between the parties of which the issue fairly may be considered by both parties as doubtful and that, at the time of the compromise, they in good faith so consider it. *It is not essential that the question be in fact doubtful in legal contemplation.*". (Italics ours.)

Likewise, in the same case, the Court of Claims quoted from 12 C. J., section 20, p. 332, as follows:

> "A claim as to which the doubt or dispute arises must be asserted honestly and in good faith."

Likewise, the Court of Claims quoted from 12 C. J., paragraph 21, p. 333, as follows:

> "'* * * a claim is honest if the claimant does not know that his claim is a mere nothing,'" and "'if both parties know all the facts and with knowledge of those facts obtain a compromise, it can not be said to be dishonest.'"

The Court of Claims, also, referred in the same case to the case of *Hennessy* v. *Bacon*, 137 U. S. 78, 85, 34 L. ed. 605, where this Court conceded that, if the plaintiff had

taken his case to the Courts, he must have been successful; but, having settled it, this Court said:

> "Such a settlement ought not to be overthrown, even if the Court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained."

We respectfully submit that this decision of this Court, if followed in the instant case, must cause a reversal of the Court of Claims' judgment in the instant case. This decision of this Court is in direct conflict with the decision of the Court of Claims in the instant case.

There is no question but that there was an honest dispute between the parties in the instant case with respect to an unliquidated claim; and that petitioners, in submitting their claim, honestly believed that they were entitled to what they claimed; and, therefore, even if a part of that claim was not legally due because of lack of consideration or any other cause, or if it developed that petitioners had no legal right to recover the item of excess cost of lumber, amounting to $8,303.71, included in the compromise agreement as the Court of Claims held, because of lack of consideration, this is not sufficient grounds for the reasons stated by this Court in *Hennessy* v. *Bacon, supra,* and other cases cited, to set aside this compromise agreement. If it was not sufficient grounds to set aside a compromise where it was to the benefit of respondent not to do so, it is certainly likewise improper to set it aside where it is not to the benefit of the petitioners to do so. This is what a compromise is for—to settle disputes and to avoid litigation. If compromise agreements are to be set aside because it was later decided by the Court that one of the parties was not legally entitled to recover on some item included in that compromise, no compromise settlement would be worth the paper

it is written on. Upon such a theory, the Court could step in and tell the parties what they could compromise and what they could not compromise.

The instant case, moreover, is much stronger in favor of petitioners than the *Trumbull Steel Company* case, *supra,* or the *Hennessy* v. *Bacon* case, *supra,* and others cited, *supra,* for the reason that in the instant case there was included in the compromise agreement an item which respondent owed petitioners for lumber which petitioners had bought for defendant's own use. There was clearly no question of consideration for that item of lumber. In the compromise, the facts developed show that petitioners made a considerable concession on this item which was unquestionably legally due petitioners. In this connection it will be noted that in the compromise agreement (Rec. 31, Court's Find. 20), there was included for this item only $2,462.25; whereas, in Revised Change Order No. 33 (Rec. 32 Court's Find. 22), the respondent by its own voluntary action conceded that there was due petitioners on this item, $5,105.87. Also, petitioners made a concession on the item of handling, in the compromise agreement, since it will be seen from the Court's Finding 20, Rec. 31, that, in the compromise agreement (Change Order 33, Court's Find. 20, Rec. 31), petitioners were allowed $2,309.64 for this item; whereas, under Revised Change Order 33, respondent voluntarily allowed plaintiffs $2,392.78 for this same item. These concessions on perfectly legitimate claims made by petitioners in the compromise agreement clearly constituted a detriment suffered by petitioners in reaching this compromise. The fact that petitioners made these concessions on these two items in the compromise agreement is absolutely proven by the fact that respondent thereafter acknowledged and actually paid petitioners more than was allowed in the compromise agreement, on both of these items.

Under the authority of the cases cited herein, including decisions of this Court, these concessions or detriments suffered by petitioners is of itself sufficient to support this compromise agreement; and the mere fact that it contained another item, which the Court of Claims holds petitioners were not entitled to, because of lack of consideration for that item, is no proper ground for setting aside this compromise settlement between the parties.

According to this Court in the *Hennessy* v. *Bacon* case, it could not be set aside for the benefit of either party, under such facts. But the Court of Claims has set aside the compromise agreement in the instant case, Change Order 33, for that very reason; namely, that it now holds that there was no consideration for one of the items included in the compromise; and, not only that, but it has not even allowed the overhead expenses in securing the lumber which petitioners bought for respondent's own use on other projects, which was certainly a legitimate item to which petitioners were unquestionably entitled and was included in the compromise agreement, but was not included in the Revised Change Order 33 (Find. 20, Rec. 31; Find. 22, Rec. 32).

In the case of *Northern Liberty Market Company* v. *Steubner,* 4 Mackey 301, 15 D. C. 301, 308, the District of Columbia Court of Appeals relied upon the decision of this Court in the case of *Northern Liberty Market Company* v. *Kelley,* 113 U. S. 199, 24 L. ed. 948. In these cases, the question was whether the original notes given by a corporation were valid or not, but this Court held it was unnecessary to express an opinion on that point because the defendant gave, in compromise of the original notes, new notes; and, in its opinion, this Court said:

> "The compromise of the disputed claim on the original notes was a legal and sufficient consideration for the

new note. Cook *vs.* Wright, 1 B. & S., 559; Tuttle *vs.* Tuttle, 12 Met., 551; Riggs *vs.* Hawley, 116 Mass. 596."

This decision of this Court is directly in point. In accordance with these decisions it is plain that in the instant case, even if the Court of Claims was correct in holding that the promise of the Contracting Officer to pay plaintiffs the excess costs incurred in the purchase of the lumber, was without consideration and, therefore, invalid, the inclusion of that claim in the compromise agreement, Change Order 33, did not affect the validity of the compromise agreement; and the Court of Claims was, therefore, in error in disregarding and holding for naught the compromise agreement Change Order 33.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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